

Hearing Date and Time: December 10, 2020 at 10:00 am (Eastern Time)

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
SEARS HOLDINGS CORPORATION, <i>et al.</i> , ¹)	Case No. 18-23538 (RDD)
Debtors.)	(Jointly Administered)

**DECLARATION OF SEAN O'NEAL IN SUPPORT OF TRANSFORM
HOLDCO LLC'S BRIEF IN OPPOSITION TO THE DEBTORS'
MOTION TO COMPEL TURNOVER OF ESTATE PROPERTY**

I, Sean O'Neal, declare under penalty of perjury as follows:

1. I am an attorney duly admitted to practice before this Court, and I am a partner of the law firm Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"), counsel for Transform

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR – Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Rover Brands Business Unit, LLC (f/k/a Sears Brands Business Unit Corporation) (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 130 W. 44nd St., 17th Fl., New York, NY 10036.

Holdco LLC (“Transform”). I respectfully submit this declaration in connection with Transform’s Brief in Opposition to the Debtors’ Motion to Compel Turnover of Estate Property.

2. Attached hereto as Exhibit A is a true and correct copy of email correspondence with the subject line “RE: Sears – Settlement Proposal Spreadsheet” between counsel for the Debtors Weil, Gotshal & Manges LLP (“Weil”) and Cleary Gottlieb, dated July 7, 2020.

3. Attached hereto as Exhibit B is a true and correct copy of email correspondence with the subject line “RE: Sears – Litigation and Insurance Claims/Closed Claims” between Weil and Cleary Gottlieb, dated November 11, 2020.

Executed on December 3, 2020 in New York, New York.

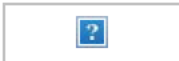
Respectfully submitted,

/s/ Sean A. O’Neal
Sean A. O’Neal

Exhibit A

7. TSA : [REDACTED]

- [REDACTED]
8. Litigation Insurance Claims: [REDACTED]
[REDACTED]
9. KCD – Lurking IP: [REDACTED]
10. Sedgwick: [REDACTED]
[REDACTED]
11. Sears Israel: [REDACTED]
12. Business Personal Property Taxes: [REDACTED]
13. Vendor Claims: Transform to pay [REDACTED]. [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
14. Specified Receivables: [REDACTED]
[REDACTED]
[REDACTED]



Jared R. Friedmann
Partner

Weil, Gotshal & Manges LLP
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New York, NY 10153
jared.friedmann@weil.com
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+1 212 310 8007 Fax

From: O'Neal, Sean A. <soneal@cgsh.com>

Sent: Friday, July 3, 2020 5:26 PM

To: Friedmann, Jared <Jared.Friedmann@weil.com>; Crozier, Jennifer Brooks
<Jennifer.Crozier@weil.com>

Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>; Marcus,
Jacqueline <jacqueline.marcus@weil.com>

Subject: RE: Sears - Settlement Proposal Spreadsheet

See below.

1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
2. [REDACTED]
[REDACTED]
[REDACTED]

Sean

Sean A. O'Neal

Cleary Gottlieb Steen & Hamilton LLP

Assistant: bamiller@cgsh.com

One Liberty Plaza, New York NY 10006

T: +1 212 225 2416 | M: +1 917 324 8364

soneal@cgsh.com | clearygottlieb.com

From: Friedmann, Jared <Jared.Friedmann@weil.com>

Sent: Friday, July 3, 2020 5:15 PM

To: O'Neal, Sean A. <soneal@cgsh.com>; Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>

Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>; Marcus, Jacqueline <jacqueline.marcus@weil.com>

Subject: RE: Sears - Settlement Proposal Spreadsheet

SUBJECT TO FRE 408

Thank you, Sean. We appreciate the movement and continued efforts to get this done. A couple of questions to make sure we understand your proposal:

1. [REDACTED]
[REDACTED]
[REDACTED]
2. [REDACTED]
[REDACTED]

We look forward to your responses and then will do our best to get back to you quickly.

Happy 4th!

Jared



Jared R. Friedmann
Partner

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jared.friedmann@weil.com
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+1 212 310 8007 Fax

From: O'Neal, Sean A. <soneal@cgsh.com>
Sent: Friday, July 3, 2020 4:43 PM
To: Friedmann, Jared <Jared.Friedmann@weil.com>; Crozier, Jennifer Brooks
<Jennifer.Crozier@weil.com>
Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>
Subject: RE: Sears - Settlement Proposal Spreadsheet

408 communication; for settlement purposes only

Thanks for the call yesterday. We appreciate your quick turn-around.

Transform's Counter-Offer is described below. It is a package deal. We have moved substantially. |

[REDACTED]

1. Altaquip and Rego Park: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
2. India/Mexico Capital Gains Taxes: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
3. Mexico Dividend: [REDACTED]
4. Seritage Receivables/Reimbursement: [REDACTED]
[REDACTED]

5. Vernon Warehouse Rent: [REDACTED]
6. Estate Name-Change: [REDACTED]
[REDACTED]
7. TSA : [REDACTED]
[REDACTED]
[REDACTED]
8. Litigation Insurance Claims: [REDACTED]
[REDACTED]
[REDACTED]
9. KCD – Lurking IP: [REDACTED]
10. Sedgwick: [REDACTED]
[REDACTED]
11. Sears Israel: [REDACTED]
[REDACTED]
12. Business Personal Property Taxes: [REDACTED]
[REDACTED]
[REDACTED]
13. Vendor Claims: [REDACTED]
[REDACTED]
14. Specified Receivables: [REDACTED]
[REDACTED]
[REDACTED]

Sean

Sean A. O'Neal

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T: +1 212 225 2416 | M: +1 917 324 8364

soneal@cgsh.com | clearygottlieb.com

From: Friedmann, Jared <Jared.Friedmann@weil.com>

Sent: Wednesday, July 1, 2020 3:15 PM

To: O'Neal, Sean A. <soneal@cgsh.com>; Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>

Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>

Subject: RE: Sears - Settlement Proposal Spreadsheet

Sean,

Are you available tomorrow afternoon after 3:30pm to continue our discussion? I've shortened the email recipient list, but feel free to add back anyone.

Thank you,
Jared



Jared R. Friedmann
Partner

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+1 212 310 8007 Fax

From: O'Neal, Sean A. <soneal@cgsh.com>

Sent: Monday, June 29, 2020 7:25 PM

To: Friedmann, Jared <Jared.Friedmann@weil.com>; Crozier, Jennifer Brooks
<Jennifer.Crozier@weil.com>

Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Levander, Samuel <slevander@cgsh.com>; Allen,
Charles W. <callen@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>; Kim, Hoori
<hokim@cgsh.com>; Elsner, Michelle <melsner@cgsh.com>; Marcus, Jacqueline
<jacqueline.marcus@weil.com>; Munz, Naomi <Naomi.Munz@weil.com>; Guthrie, Hayden
<Hayden.Guthrie@weil.com>; Hwang, Angeline <Angeline.Hwang@weil.com>

Subject: RE: Sears - Settlement Proposal Spreadsheet

How about 12 pm?

Will be just me and Brian from Cleary.

Sean

Sean A. O'Neal

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soneal@cgsh.com | clearygottlieb.com

From: Friedmann, Jared <Jared.Friedmann@weil.com>
Sent: Monday, June 29, 2020 5:48 PM
To: O'Neal, Sean A. <soneal@cgsh.com>; Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>
Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Levander, Samuel <slevander@cgsh.com>; Allen, Charles W. <callen@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>; Kim, Hoori <hokim@cgsh.com>; Elsner, Michelle <melsner@cgsh.com>; Marcus, Jacqueline <jacqueline.marcus@weil.com>; Munz, Naomi <Naomi.Munz@weil.com>; Guthrie, Hayden <Hayden.Guthrie@weil.com>; Hwang, Angeline <Angeline.Hwang@weil.com>
Subject: RE: Sears - Settlement Proposal Spreadsheet

Sean,

Are you available tomorrow at some time between 10:30am-1pm?

Thanks,
Jared

From: O'Neal, Sean A. <soneal@cgsh.com>
Sent: Monday, June 29, 2020 4:30 PM
To: Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>
Cc: Barefoot, Luke A. <lbarefoot@cgsh.com>; Levander, Samuel <slevander@cgsh.com>; Allen, Charles W. <callen@cgsh.com>; Giunta, Brian <bgiunta@cgsh.com>; Kim, Hoori <hokim@cgsh.com>; Elsner, Michelle <melsner@cgsh.com>; Friedmann, Jared <Jared.Friedmann@weil.com>; Marcus, Jacqueline <jacqueline.marcus@weil.com>; Munz, Naomi <Naomi.Munz@weil.com>; Guthrie, Hayden <Hayden.Guthrie@weil.com>; Hwang, Angeline <Angeline.Hwang@weil.com>
Subject: Re: Sears - Settlement Proposal Spreadsheet

I'd like to be in position to give you a counter offer. Can we chat tomorrow?

Sean

—

Sean A. O'Neal

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soneal@cgsh.com | clearygottlieb.com

On Jun 29, 2020, at 4:10 PM, Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com> wrote:

SETTLEMENT COMMUNICATION
FRE 408 AND RULES OF SIMILAR IMPORT

Counsel:

Attached please find [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1. [REDACTED]

2. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Please let us know if you have any questions or would like to discuss the above.

Sincerely,

Jennifer

[REDACTED]

[REDACTED]

<image001.jpg>

Jennifer Brooks Crozier
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* Admitted to practice in Connecticut and Texas.

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<Sears - 6.25.2020 Debtors Settlement Proposal 2.0

Disputes_WEIL_97533977_5.XLSX>

<SHC Israel - Summary USD February 2019 to April 2020.pdf>

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Exhibit B

From: [Crozier, Jennifer Brooks](#)
To: [Levander, Samuel](#); [O'Neal, Sean A.](#)
Cc: [Friedmann, Jared](#); [Marcus, Jacqueline](#)
Subject: RE: Sears - Litigation and Insurance Claims/Closed Claims
Date: Wednesday, November 11, 2020 10:56:45 AM

Sam:

Thank you for your response. As I indicated on Friday, the below arguments are not even remotely colorable and underscore Transform's bad faith in refusing to turn over to the Debtors the proceeds of Litigation and Insurance Claims that unquestionably belong to the Debtors under the APA in violation of the APA, the Second APA Settlement Agreement, and the applicable provisions of the Bankruptcy Code, including 11 U.S.C. § 362. Beyond the arguments' obvious infirmities, Transform appears to be saying that, in negotiating the Second APA Settlement Agreement, it made a misrepresentation of material fact which it knew to be false (that the Closed Claims had "Actual Recover[ies]" when, in fact, Transform had "actually recovered" the proceeds of those Claims even though it knew the proceeds belonged to the Debtors under the APA) with the intention of inducing the Debtors to enter into the Agreement (and no intention of turning the Closed Claims' proceeds over to the Debtors). It's hard for us to believe that you would want us to go to Judge Drain on this one.

We also are puzzled as to how you can claim both that (i) Transform has no obligation to turn over the proceeds of Closed Claims it is holding when it acknowledged and agreed that "any and all rights, title, or interest in, to, or under" those Claims "belong to the Debtors under the APA" presumably because it received those proceeds (and held on to them) prior to the Court's approval of the Second APA Settlement Agreement; and (ii) you will only provide information concerning the disposition of those same Claims and the distribution of any and all proceeds associated with them if Debtors agree to reimburse Transform for any time spent by Transform personnel to provide that information (the same information that we could instead obtain through discovery in connection with a motion for turnover).

Before we bring this dispute to the Court's attention, we will give Transform until **2:00 p.m. ET on Thursday, November 12, 2020** to confirm that: (1) Transform personnel will continue to provide the Debtors and their advisors with any information in their possession, custody, or control concerning, among other things, the disposition of the Closed Claims and the distribution of any and all proceeds associated with the Closed Claims (we will reimburse Transform for such time in a manner consistent with what the Parties agreed to in the Second APA Settlement Agreement except for Debtor-owned Closed Claims that you assert Transform is not obligated to transfer the proceeds of); and (2) to the extent Transform recovered the proceeds of any or all these Debtor-owned Closed Claims, Transform will promptly turn those proceeds over to the Debtors.

Should we not receive such confirmation from you by 2:00 p.m. on Thursday, in addition to seeking relief from the Bankruptcy Court, we will treat Transform's refusal as a material breach of the Second APA Settlement Agreement that relieves/excuses the Debtors from further performance, including of the obligation to transfer the Indian Acquired Foreign Assets to Transform. See *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 417, 430 (S.D.N.Y. 2004) ("By keeping all of

the payments made on accounts sold to Towers [the counterclaim-defendant], Hunt Health [the counterclaim-plaintiff] deprived Towers of the benefit it reasonably expected, namely, the return of its advances plus factoring fees. Hunt Health thereby materially breached the agreement. . . . These material breaches relieved Towers of its obligations remaining under the contract”).

Should you want to discuss the above, please don't hesitate to contact us.

Sincerely,

Jennifer



Jennifer Brooks Crozier
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New York, New York 10153-0119
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+1 860 910 8900 Mobile
+1 212 310 8007 Facsimile

From: Levander, Samuel <slevander@cgsh.com>
Sent: Tuesday, November 10, 2020 10:33 AM
To: Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>; O'Neal, Sean A. <soneal@cgsh.com>
Cc: Friedmann, Jared <Jared.Friedmann@weil.com>; Marcus, Jacqueline <jacqueline.marcus@weil.com>
Subject: RE: Sears - Litigation and Insurance Claims/Closed Claims

Jennifer,

Thank you for the call Thursday and your follow-up email.

As we discussed, the contractual language of the Second APA Settlement Agreement is crystal clear: “[N]either Party shall be required to make any cash payment to the other Party pursuant to this Agreement, except in connection with the Vornado Claims, the Altaquip Claims, and the Bayamon/Panama City Claims as may be required pursuant to Sections 2 and 10(c) above, or in connection with any post-Execution Date Buyer Transition Services, as may be required pursuant to Section 9(b) above.” Second APA Settlement Agreement § 17(b).

That is, Transform has no obligation to make any cash payment pursuant to the Agreement, including with regard to the Closed Claims. To further clarify this point, this provision carves out four specific exceptions – (1) the Vornado Claims, (2) the Altaquip Claims, (3) the Bayamon/Panama City

Claims, and (4) any post-Execution Date Buyer Transition Services – and the Closed Claims are not among them.

Section 18(a) of the Second APA Settlement Agreement further provides for a comprehensive and broad mutual release of any potential claims under, arising out of, or in connection with the Closed Claims:

Upon the Effective Date, Transform and each of the Debtors, on behalf of itself, its controlled affiliates, and each and all of its and its affiliates' respective past and present successors and assigns or any entity asserting a claim released hereunder either through or on behalf of any such parties (all such releasing persons and entities collectively, the "Releasing Parties"), does hereby fully, unconditionally and irrevocably release, relieve, waive, relinquish, remise, acquit and forever discharge the other Party and such other Party's respective past, present and future agents, heirs, executors, administrators, conservators, successors, assigns, noteholders, participants, co-participants, direct and indirect parents, principals, subsidiaries, affiliates, related companies, shareholders, interest holders, investors, members, partners (including, without limitation, general and limited partners), managers, directors, representatives, contractors, service providers, receivers, attorneys and beneficiaries, and the past, present, and future officers, directors, and employees (all such released persons and entities, collectively, the "Released Parties") from, against, and in respect of any and all past, present, and future claims, cross-claims, counterclaims, third-party claims, demands, liabilities, obligations, debts, liens, damages, losses, costs, expenses, controversies, actions, rights, suits, assessments, penalties, charges, indemnities, guaranties, promises, commitments, appeals, or causes of action of whatsoever nature, whether based in contract, tort or otherwise, whether in law or equity and whether direct or indirect, fixed or contingent, that any of the Parties have or may have against any of the other Parties since the beginning of time, under, arising out of or in connection with the Additional APA Disputes (all of the foregoing, the "Released Claims"), which Released Claims shall include for the avoidance of doubt any right to claim an award of attorneys' fees or other costs and expenses incurred in, or in connection with, any of the foregoing.

"Additional APA Disputes" is defined in the final whereas clause of the Second APA Settlement Agreement to include the "Litigation and Insurance Claims Dispute," which encompasses all of the Closed Claims described in your email below and any other matters involving the Litigation and Insurance Claims that could have been asserted by a Party as of the date of the settlement agreement.

The upshot is that Transform has no obligation to make any cash payment related to the Closed Claims, and the Debtors have released any potential claims related to the Closed Claims.

As discussed on our call on Thursday, we will liaise with our client in an effort to provide you with requested information regarding the Closed Claims, provided that you confirm that Transform will be entitled to reimbursement under the February 11, 2019 Transition Services Agreement and § 9(b) of the Second APA Settlement Agreement for any time spent by Transform personnel responding to any such requests.

Transform reserves all rights.

Best regards,
Sam

Samuel Levander

Cleary Gottlieb Steen & Hamilton LLP

Assistant: mdigiario@cgsh.com

One Liberty Plaza, New York NY 10006

T: +1 212 225 2951

slevander@cgsh.com | clearygottlieb.com

From: Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>

Sent: Friday, November 6, 2020 6:11 PM

To: O'Neal, Sean A. <soneal@cgsh.com>; Levander, Samuel <slevander@cgsh.com>

Cc: Friedmann, Jared <Jared.Friedmann@weil.com>; Marcus, Jacqueline
<jacqueline.marcus@weil.com>

Subject: Sears - Litigation and Insurance Claims/Closed Claims

Sean:

Yesterday we discussed the Debtors' efforts to recover on the Litigation and Insurance Claims (as defined in the Settlement Agreement by and between Transform and the Debtors dated September 17, 2020 (the "**Second APA Settlement Agreement**"))—specifically, those Litigation and Insurance Claims that Transform indicated were "closed" in Luke Barefoot's letter to Jared Friedmann dated May 20, 2020. For clarity, the Debtor-owned "closed claims" include the following claims:

Store	Recovery	Date of Loss
1111 Colorado Springs	\$28,301.03	8/3/2018
3527 Philadelphia	\$13,500.00	11/16/2018
1884 King of Prussia	\$34,364.08	10/1/2010
2195 Titusville	\$384,391.00	9/1/2017
7622 Franklin	\$3,250.51	2/14/2015
45575 Stockton	\$50,000.00	7/24/2019
6735 Orange Park	\$793.68	1/8/2016
6735 Orange Park	\$2,568.84	11/4/2018
6347 Florida	\$369.58	12/15/2015
7134 Cortland	\$96,480.22	8/8/2013
2911 Bayamon	\$717.29	2/8/2018
3424 Gainesville	\$2,392.50	12/7/2018
4026 St. Joseph	\$40,790.00	1/11/2018
1300 Oak Brook	\$18,750.00	1/21/2019
TOTAL	\$676,668.73	

(the "**Closed Claims**"). See Second APA Settlement Agreement at ¶ 10(a) ("The Parties acknowledge and agree that any and all rights, title, or interest in, to, or under the Litigation and Insurance Claims

listed in Category 1 of Schedule 1 attached hereto belong to the Debtors under the APA. Transform releases, waives, and relinquishes to the Debtors any and all right, title, and interest in, to, or under each of the Litigation and Insurance Claims listed in Category 1."); *see also id.* at Schedule 1.

Please confirm (1) that Transform personnel will continue to provide the Debtors and their advisors with any information in their possession, custody, or control concerning, among other things, the disposition of the Closed Claims and the distribution of any and all proceeds associated with the Closed Claims and (2) that, to the extent **Transform** recovered the proceeds of any or all these Debtor-owned Closed Claims, Transform will promptly turn those proceeds over to the Debtors pursuant to the APA, the Second APA Settlement Agreement, and the provisions of the Bankruptcy Code. As I suggested yesterday, there is no colorable argument Transform can make that will justify a failure or refusal to turn those proceeds over to the Debtors.

Should you want to discuss the above, please let us know.

The Debtors reserve all legal and equitable rights and remedies with respect to all of the Litigation and Insurance Claims.

Thank you,

Jennifer



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